Mohd Nor Afandi bin Mohamed Junus v Rahman Shah Alang Ibrahim & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO A-01–95 OF 2006
GOPAL SRI RAM, JAMES FOONG AND SURIYADI JJCA
7 AUGUST 2007

Civil Procedure — Trial — Submission of no case to answer — Appeal — Whether should order a re-trial of matter — Effect — Whether plaintiff had sufficiently proved his case

Tort — Negligence — Road accident — Collision with motor lorry bearing plate number starting with Z — Whether vehicle belonged to government — Whether driver of vehicle agent of government — Motor Vehicle (Registration and Licensing) Rules 1959

Tort — Negligence — Road accident — Where car driven by person other than owner, presumption raised that driver of car is servant or agent of owner — Whether presumption applicable in this case — Whether plaintiff had sufficiently adduced evidence to invoke this presumption

The appellant (plaintiff), a rider of a motorcycle, had claimed against the driver of a motor lorry ZA 2596 ('first defendant'), as the servant and agent of the Government of Malaysia ('second defendant/second respondent'), as well as the second defendant for injuries and damages sustained pursuant to a collision between the motorcycle and the motor lorry. According to the appellant, since the motor lorry carried a license plate bearing No ZA 2596, it must be presumed that this vehicle belonged to the military and therefore the property of the second defendant, and anyone found driving it must also be presumed to be the servant and/or agent of the second defendant. The first defendant failed to file a defence. In its statement of defence, the second defendant denied knowledge of the accident and refuted the appellant's claim that the first defendant was a servant and/or agent of the second defendant at the material time. The second defendant at the end of the appellant's case submitted no case to answer and opted not to adduce any evidence. The session court dismissed the appellant's claim altogether. At the appeal in the High Court, the judge allowed the appellant's appeal against the first defendant but dismissed his appeal against the second defendant. Dissatisfied, the appellant appealed to the Court of Appeal.

Held, allowing the appeal with costs:

(1) (per **Suriyadi JCA** delivering majority judgment) It must be understood that once a defendant elects not to call for evidence, apart from him being bound by that election, the effect is also that all the evidence led by the plaintiff must be assumed to be true (see para 32).

(2) (per **Suriyadi JCA** delivering majority judgment) Under the heading of Fifth Schedule to the Motor Vehicles (Registration and Licensing) Rules 1959 (rr 2 and 5) all index marks starting with Z on a vehicle belongs to the armed forces. If this is read with r 28, the index marked Z belonged to the Government of Malaysia (see para 36).

(3) (per **Suriyadi JCA** delivering majority judgment) From the given evidence and law as propounded, the driver who drove that impugned vehicle therefore must be presumed, to have driven it with the permission of the second defendant and that the first defendant, was the servant or agent of the Government of Malaysia. Having found the evidence satisfactory, reliable and by no stretch of the imagination farfetched, to vitiate the presumption of truth and with the second defendant not being assisted by the non-materialisation of rebuttal evidence, the court found in favour of the appellant (see paras 42–43).

(4) (per **Suriyadi JCA** delivering majority judgment) It was clear that the submission of the second defendant was of no case to answer simpliciter and not a submission of no case to answer based on unsatisfactory or unreliable nature of the evidence led by the plaintiff, which would have caused the court some trouble in arriving at a just decision (*Storey v Storey* [1960] 3 All ER 279; *Yuill v Yuill* [1945] 1 All ER 183). Thus, having considered the matter in its entirety, there is no reason whatsoever to have it remitted for a new and costly trial (see para 45).

(5) (per **James Foong JCA** dissenting) The plaintiff must first establish a relationship between the first defendant and the second defendant and then to prove that the negligent act committed by the first defendant was connected to the nature of this relationship (see para 15).

(6) (per **James Foong JCA** dissenting) Before the proposition that 'where a car is driven by a person other than the owner, the presumption is raised that the driver of the car is the servant or agent of the owner' can be applied, the pre-requisite of the motor vehicle actually belonging to the person accused of being vicariously liable must be established. This is necessary because it is not the motor vehicle that is vicariously liable; it is the owner of such vehicle who is (see para 17).

(7) (per **James Foong JCA** dissenting) If a presumption of ownership of a motor vehicle, which amounts to no more than inferences logically drawn from one fact as to the existence of another, arising merely from

an indication of a motor vehicle number plate then the burden of proof upon the plaintiff to establish vicarious liability onto the second defendant is too lenient and exceeding light particularly when this involves liability of a party who did not directly commit the negligent act. Further, the consequences are far reaching should this be followed by the presumption that when a vehicle is driven by a person other than the owner it is presumed that he is the servant or agent of the owner. This would amount to a double presumption (see para 18).

[Bahasa Malaysia summary

Perayu (plaintif), penunggang sebuah motosikal, telah menuntut terhadap pemandu motor lori ZA 2596 ('defendan pertama'), sebagai kakitangan dan ejen Kerajaan Malaysia ('defendan kedua/responden kedua'), termasuk defendan kedua bagi kecederaan dan kerosakan yang dialami berikutan perlanggaran antara motosikal dan motor lori tersebut. Menurut perayu, memandangkan motor lori menggunakan plat lesen bernombor ZA 2596, ia harus dianggap bahawa kenderaan tersebut adalah milik anggota tentera dan oleh itu milik defendan kedua, dan sesiapa yang didapati memandunya juga harus dianggap sebagai kakitangan dan/atau ejen defendan kedua. Defendan pertama gagal memfailkan pembelaan. Dalam pernyataan pembelaannya, defendan kedua menafikan pengetahuan tentang kemalangan tersebut dan menyangkal dakwaan perayu bahawa defendan pertama adalah kakitangan dan/atau ejen defendan kedua pada masa material. Defendan kedua, pada akhir kes perayu menghujah bahawa tiada kes untuk dijawab dan memilih untuk tidak mengemukakan apa-apa keterangan. Mahkamah sesyen menolak tuntutan perayu secara keseluruhannya. Semasa rayuan di Mahkamah Tinggi, hakim membenarkan rayuan perayu terhadap defendan pertama tetapi menolak rayuannya terhadap defendan kedua. Berasa tidak puas hati, perayu merayu ke Mahkamah Rayuan.

Diputuskan, membenarkan rayuan dengan kos:

(1) (oleh **Suriyadi HMR** menyampaikan penghakiman majoriti) Ia mesti difahami bahawa apabila seorang defendan memilih untuk tidak mengemukakan keterangan, selain daripada terikat dengan pilihan itu, ia juga mempunyai kesan bahawa semua keterangan yang dikemukakan oleh plaintif mesti dianggap benar (lihat perenggan 32).

(2) (oleh **Suriyadi HMR** menyampaikan penghakiman majoriti). Di bawah tajuk Jadual Kelima Kaedah-Kaedah Kenderaan Motor (Pendaftaran dan Perlesenan) 1959 (kk 2 dan 5) semua tanda-tanda indeks yang bermula dengan Z di kenderaan adalah milik angkatan

tentera. Jika ini dibaca bersama dengan k 28, indeks bertanda Z adalah milik Kerajaan Malaysia (lihat perenggan 36). A

(3) (oleh **Suriyadi HMR** menyampaikan penghakiman majoriti) Berdasarkan keterangan yang diberikan dan undang-undang, pemandu yang memandu kenderaan yang dipersoalkan tersebut oleh itu harus dianggap sebagai telah memandunya dengan izin defendan kedua dan juga defendan pertama, adalah kakitangan atau ejen Kerajaan Malaysia. Setelah mendapati keterangan tersebut memuaskan, boleh dipercayai dan munasabah untuk mencacatkan anggapan kebenaran dan dengan defendan kedua tidak dibantu dengan keterangan yang mematahkan, mahkamah membuat dapatan yang memihak kepada perayu (lihat perenggan 42–43). B C

(4) (oleh **Suriyadi HMR** menyampaikan penghakiman majoriti) Adalah jelas bahawa penghujahan defendan kedua adalah satu kes yang tidak dapat dijawab dan bukanlah penghujahan tiada kes untuk dijawab berpandukan sifat keterangan yang tidak memuaskan atau tidak boleh digunakan yang telah dikemukakan oleh plaintif yang akan memberikan masalah kepada mahkamah dalam mencapai satu keputusan yang adil (*Storey v Storey* [1960] 3 All ER 279; *Yuill v Yuill* [1945] 1 All ER 183). Setelah mempertimbangkan hal ini secara menyeluruh, tiada sebab untuk ia dihantar semula untuk perbicaraan baru dan mahal (lihat perenggan 45). D E

(5) (oleh **James Foong HMR** menentang) Plaintif mesti pertamanya membuktikan hubungan di antara defendan pertama dan defendan kedua dan kemudiannya membuktikan tindakan cuai yang dilakukan oleh defendan pertama berkait dengan sifat hubungan tersebut (lihat perenggan 15). F

(6) (oleh **James Foong HMR** menentang) Sebelum usul 'where a car is driven by a person other than the owner, the presumption is raised that the driver of the car is the servant or agent of the owner' boleh digunapakai, pra syarat awal di mana kenderaan bermotor sebenarnya adalah milik orang yang bersalah secara vikarius mesti dibuktikan. Ini adalah perlu kerana bukan kenderaan bermotor itu yang bersalah secara vikarius, tetapi pemilik kenderaan tersebut (lihat perenggan 17). G H

(7) (oleh **James Foong HMR** menentang) Jika anggapan pemilikan kenderaan bermotor, yang bermaksud tidak lebih dari membuat kesimpulan secara logik daripada satu fakta berkenaan wujudnya yang lain, yang timbul semata-mata dari tanda dari plat nombor kenderaan maka beban pembuktian oleh plaintif untuk membuktikan vikarius liabiliti terhadap defendan kedua adalah terlalu longgar dan lebih ringan lebih-lebih lagi bila ia melibatkan liabiliti satu pihak yang tidak secara langsung melakukan perbuatan cuai tersebut. Tambahan pula, I

akibatnya adalah tidak munasabah sekiranya ia diikuti dengan anggapan bahawa apabila sesuatu kenderaan dipandu oleh seorang yang bukan pemiliknya maka beliau dianggap sebagai pekerja atau ejen pemilik tersebut. Ini bermakna anggapan berganda dibuat (lihat perenggan 18).]

Notes

For cases on road accident, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1664–1665.

For cases on submission of no case to answer, see 2(3) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 7888–7893.

Cases referred to

Adnan bin Hj Mat Jidin & Anor v Irwan Wee bin Abdullah & Anor [1997] 2 MLJ 775 (refd)

Damai Cheras Sdn Bhd & Anor v Poothapillai Krishnamoorthy [1998] 1 MLJ 639 (refd)

Hewitt v Bonvin [1940] 1 KB 188 (refd)

Jaafar bin Shaari & Anor (suing as administrators of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor [1997] 3 MLJ 693 (refd)

Karthiyayani & Anor v Lee Leong Sin & Anor [1975] 1 MLJ 119 (refd)

Kayat & Anor v Lim Yew Seng [1972] 1 MLJ 26 (refd)

Kek Kee Leng v Teresa Bong Nguk Chin & Anor [1978] 1 MLJ 61 (refd)

Niaz Bi Bi v Mogah Omnibus Co Ltd [1960] MLJ 22 (refd)

Ramayee a/p Gengan & Ors [1983] 1 CLJ 326 (refd)

See Keng Wah v Lim Tew Hong [1957] MLJ 137 (refd)

Simirah v Chua Hock Lee & Anor [1963] MLJ 239 (refd)

Storey v Storey [1960] 3 All ER 279 (refd)

UN Pandey v Hotel Marco Polo Pte Ltd [1980] 1 MLJ 4 (refd)

Young v Rank [1950] 2 KB 510 (refd)

Yuill v Yuill [1945] 1 All ER 183 (refd)

Legislation referred to

Government Proceedings Act 1956 ss 2, 5, 6, 6(1)

Motor Vehicles (Registration and Licensing) Rules 1959 rr 2, 5, 28, Fifth Schedule, para 2

Road Transport Act 1987 ss 7, 8

Appeal from: Civil Appeal No 12–126 of 2004 (High Court, Ipoh)

Brijnandan Singh Bhar (Brijnandan Singh Bhar & Co) for the appellant.

Azura Alwi (Senior Federal Counsel, Attorney General's Chambers) for the respondent.

James Foong JCA (delivering dissenting judgment):

INTRODUCTION

[1] We heard this appeal on 30 July 2007. By a majority decision, we allowed it with costs with me dissenting. I now give my reasons for doing so.

FACTS

[2] As this case originated from the sessions court which went on appeal to the High Court and finally to us in the Court of Appeal, it is best that I described the parties in their original capacities to avoid confusion as to their status.

[3] In the statement of claim, the plaintiff alleged that he was collided into by a motor lorry ('said motor lorry') bearing registration No ZA 2596 while he was riding his motorcycle along Jalan Timur, Felda Selatan, Sungkai, Perak at about 11.30am on 19 September 1997. He claimed that the said motor lorry which was driven by the first defendant, a driver, servant and/or agent of the second defendant, was negligent at the material time. Due to injuries sustained as a result of this accident, the plaintiff claimed special and general damages.

[4] Initially, in the sessions court, the first defendant appeared to be represented. But when the trial was about to begin, it was recorded on 29 January 2004 that he was unrepresented. And when the trial took place on 18 March 2004, he was not present. There is no statement of defence by the first defendant found in the appeal record.

[5] The second defendant had filed a statement of defence and was represented at the trial. In the statement of defence, the second defendant denies knowledge of the accident and refutes the plaintiff's claim that the first defendant was a servant and/or agent of the second defendant at the material time.

[6] During the trial, at the close of the plaintiff's case, the second defendant submitted no case to answer, and declared that it will not be calling any witness. Effectively, this means the second defendant had elected to forfeit its rights to tender any evidence in court to defend its case, and would therefore rely on the evidence adduced by the plaintiff to maintain that the plaintiff had not established a case in law against it or that the evidence so far adduced was so unsatisfactory or unreliable that the plaintiff's burden of proving its claim had not been discharged — see *Ramayee a/p Gengan & Ors* [1983] 1

CLJ 326, *Niaz Bi Bi v Mogah Omnibus Co Ltd* [1960] MLJ 22 and *UN Pandey v Hotel Marco Polo Pte Ltd* [1980] 1 MLJ 4.

[7] Over this contention, the sessions court ruled in favour of the second defendant. The reasons given were: the plaintiff had failed to prove (a) the driver of the said motor lorry ZA 2596 was an 'officer' under s 5 of the Government Proceedings Act 1956 ('GP Act') and; (b) the second defendant was the registered owner of the said motor lorry. Accordingly, the plaintiff's claim against the second defendant was dismissed with costs. However, for completeness, the sessions court assessed damages and found that in the event that the second defendant was liable, based on 100%, the plaintiff should be entitled to RM85,150 as general damages and RM745 for special damages with interest thereon. In respect of the first defendant, the sessions court made no order.

[8] Dissatisfied with this decision, the plaintiff appealed to the High Court. The High Court dismissed the plaintiff's appeal against the second defendant on virtually the same grounds proffered by the sessions court. However, the appeal against the first defendant was allowed with damages as assessed by the sessions court.

[9] The notice of appeal filed by the plaintiff to this court is against the decision of the learned High Court judge given on 29 November 2005. This covers both liability and quantum. However, when this court indicated to the plaintiff that his appeal would be allowed against the second defendant, the plaintiff withdrew his appeal against quantum.

THE PLAINTIFF'S CONTENTION

[10] The main contention of the plaintiff in this appeal against the second defendant is that since the motor lorry carried a licence plate bearing No ZA 2596, it must be presumed that this vehicle belonged to the military and therefore the property of the second defendant, and anyone found driving it must also be presumed to be the servant and/or agent of the second defendant. When these presumptions were raised, it was upon the second defendant to adduce evidence to rebut them. Since the second defendant had elected to tender no rebuttable evidence, the plaintiff's claim against the second defendant ought to succeed.

ISSUE

[11] In view of the second defendant's submission of no case to answer and elected to call no evidence, the only issue in this appeal is whether based on

the evidence adduced, the plaintiff had established a case in law against the second defendant or whether the plaintiff had discharged his burden of proof.

PRINCIPLES OF LAW

[12] To determine this issue, it is necessary to first set out the principles of law regarding the plaintiff's claim against the second defendant. Going by the pleadings, the plaintiff's claim against the second defendant is founded on vicarious liability: that the second defendant is liable for the negligent act of the first defendant who was the driver, servant and/or agent of the second defendant at the material time.

According to *Law of Tort in Malaysia* by Norchaya Talib:

> Vicarious liability refers to a situation where *A* is liable to *C* for damage or injury suffered by *C* due to the negligence or other tort committed by *B*. *A* need not have done anything wrongful and *A* further need not owe a duty of care to *C*. *The most important condition for imposing liability on A is the nature of relationship between A and B and the tort committed by B is connected to the nature of this relationship*. This relationship is usually that of master and servant or employer and employee and as between a principal and his agent. (Emphasis added.)

[13] In a situation relating to motor accident, the Federal Court in *Karthiyayani & Anor v Lee Leong Sin & Anor* [1975] 1 MLJ 119 at pp 121–122 said:

> Although there is some force in saying that the fact of ownership is a valuable consideration in determining whether or not the driver is driving independently or for and on behalf of the owner, it would be surprising that that fact alone could saddle the owner with liability. It has never been the law that the owner of a car is responsible in law for damage done by the negligence of a person to whom the car is lent or whom he has permitted to use it ...
>
> It can therefore be seen that the test of vicarious liability in such cases as the present is not the 'interest and concern' argument. The principle that the owner of a car is vicariously liable for the user of it by someone whom he has permitted to use it if he has an interest or concern in the purposes for which it is being used, is not only unsatisfactory but unwarranted. Every person who permits another to use his car may be said to have an interest or concern in the car being carefully used and in most cases to have an interest or concern in the safety of the driver but it has never been the law that mere permission is sufficient to establish vicarious liability. A person who permits another to use his car does not become the former's agent if on his own volition he uses it for the owner's benefit, eg a person using his brother's car with permission does not become the latter's agent because, remembering that the latter has a luggage at the shop he uses the car to collect it. If the journey is at the owner's own request as in *Ormrod*'s case or where the owner asks his brother to bring the car to the railway station to meet him, then the driver can be said to do an act for the owner and acting as his agent. The owner is liable

A because he has authorised or requested the act or because the driver is carrying out a task or duty delegated to him, or because he is in control of the driver's conduct. He is not liable just because he has given permission to use the car, and has an interest or concern in the purpose for which the car is being used. The phrase *qui facit per alium, facit per se* correctly expresses the principle governing vicarious liability.

B

[14] This principle enunciated by the Federal Court was quoted in extenso by Gopal Sri Ram JCA in the Court of Appeal case of *Adnan bin Hj Mat Jidin & Anor v Irwan Wee bin Abdullah & Anor* [1997] 2 MLJ 775 at p 781.

C

APPLICATION TO THE FACTS

[15] From the evidence adduced there is little doubt that the first defendant
D was negligent in colliding into the plaintiff. But what is more important in this appeal is whether the second defendant was vicariously liable for this negligent act of the first defendant. From the principles disclosed, the plaintiff must first establish a relationship between the first defendant and the second defendant and then to prove that the negligent act committed by the
E first defendant is connected to the nature of this relationship.

[16] Was there a relationship between the first defendant and the second defendant? Directly, there is none. The plaintiff was in fact a Felda settler and there is no evidence to indicate that he was either a soldier or an employee
F or agent of the plaintiff at the material time. Indirectly, the plaintiff relied on the fact that the said motor lorry driven by the first defendant carried a military number plate. Would this be sufficient to convince the court that the second defendant and the first defendant had a relationship of a master and servant or a principal and an agent respectively?

G

[17] I am aware of a number of authorities that say that 'where a car is driven by a person other than the owner, the presumption is raised that the driver of the car is the servant or agent of the owner' see *Kayat & Anor v Lim Yew Seng* [1972] 1 MLJ 26 at p 27. This proposition was followed in a
H number of authorities which are listed out comprehensively by Low Hop Bing J (as he then was) in *Damai Cheras Sdn Bhd & Anor v Poothapillai Krishnamoorthy* [1998] 1 MLJ 639 at p 644. Though I accept this proposition but before this presumption applies, the pre-requisite of the motor vehicle actually belonging to the person accused of being vicariously liable must be
I established. This is necessary because it is not the motor vehicle that is vicariously liable; it is the owner of such vehicle who is. Thus it is essential that ownership of the motor vehicle involved must be proved and ascertained before this presumption can be effective. In *Kayat & Anor v Lim Yew Seng* and *Damai Cheras Sdn Bhd & Anor v Poothapillai Krishnamoorthy*, and all those

cases cited therein relating to this proposition, as well as *Karthiyayani & Anor v Lee Leong Sin & Anor* and *Adnan bin Hj Mat Jidin & Anor v Irwan Wee bin Abdullah & Anor*, the ownership of the vehicle involved in the accident was established to belong to the person or body who was accused of being vicariously liable. But until and unless this is satisfied, this presumption cannot arise. So it is pointless to rely on these authorities to say that just because someone is driving someone else's vehicle and was negligent in causing the motor accident, the person who is supposed to be the owner of the motor vehicle is vicariously liable to the plaintiff without the need to positively prove that the vehicle belonged to the person being sued in a vicarious capacity.

[18] To prove ownership of a motor vehicle the best evidence would be a confirmation from the Director for Road Transport who keeps a register of all motor vehicles possessed or used on our roads as is required by s 8 of the Road Transport Act 1987 ('RTA') to be read with s 7 of the same Act. Alternatively, like in most of the cases cited above, ownership was not denied by the defendant concerned. But here in our instant case, the only proof advanced by the plaintiff was that the motor lorry carried a number plate that bore an index mark which according to r 28 of the Motor Vehicles (Registration and Licensing) Rules 1959 (LN 173/1959) ('the Rules') reveals the status of the owner of the vehicle as the armed forces and therefore the property of the Government of Malaysia. But is this sufficient? My answer is in the negative for the following reasons:

First, the plaintiff had under cross-examination agreed to a suggestion put forth by the second defendant that the motor lorry was carrying 'kelapa sawit' (palm fruit) and *not a military lorry*. This fact was fortified by the answer from the plaintiff's second witness (PW2), a police officer who was associated with the investigation into the motor accident that: 'Dulu askar tapi sekarang bukan motolori askar' (formerly military but now it is not a military lorry).

Second, a vehicle number plate displaying an index mark followed by a set of numbers (which in this case was ZA 2596) mounted on a vehicle is only an indication that the vehicle is registered under s 7 of the RTA and the status of the owner. Indeed under the Fifth Schedule, para (2) of the Rules, the 'Status of Owner of Vehicle' with an index alphabet 'ZA' is the armed forces but as I have said, this is only an indication that such vehicle is associated with that establishment. 'Status' as used in the Fifth Schedule of the Rules, in my view, only indicates position, rank or standing (see *The Concise Oxford Dictionary*); it does not confer ownership. To ascertain the ownership of the vehicle, reference must be made to the register kept by the Director of Road Transport. If a presumption of ownership of a motor vehicle, which amounts to no more than inferences logically drawn from one fact as to the existence of another, arising merely from an indication of a motor vehicle number plate then I am afraid that the burden of proof upon the plaintiff to establish

vicarious liability onto the second defendant is too lenient and exceeding light particularly when this involves liability of a party who did not directly commit the negligent act. Further, the consequences are far reaching should this be followed by the presumption that when a vehicle is driven by a person other than the owner it is presumed that he is the servant or agent of the owner. This would amount to a double presumption; an approach much discouraged by the courts in criminal cases which, in my view, should be applied with equal force to civil cases. To permit this would be to depart from the cherished principle of *ei qui affirmat non ei qui negat incumbit probation* (the burden of proof lies on him who affirms a fact not on him who denies it). I am of the view that to warrant such departure from this established principle of common law there must be evidence of a more substantial and convincing nature since any presumption of fact should be cautiously exercised.

[19] Were I, however, to be wrong in arriving at the above conclusion and that the presumption establishing the ownership of the motor lorry to be that of the second defendant, and assuming the second presumption that the driver being the servant and/or agent of the second defendant has also arisen, there is still the requirements of ss 5 and 6(1) of the GP Act to be satisfied. These sections demand:

> 5 Liability of the Government in tort
>
> Subject to this Act, the Government shall be liable for any wrongful act done or any neglect or default committed by any public officer in the same manner and to the same extent as that in which a principal, being a private person, is liable for any wrongful act done, or any neglect or default committed by his agent, and for the purposes of this section and without prejudice to the generality thereof any public officer acting or purporting in good faith to be acting in pursuance of a duty imposed by law shall be deemed to be the agent of and to be acting under the instructions of the Government.
>
> 6 Limits of liability of the Government
>
> (1) No proceedings shall lie against the Government by virtue of section 5 in respect of any act, neglect or default of any public officer, unless proceedings for damages in respect of such act, neglect or default would have lain against such officer personally.

[20] From these provisions, it is explicit that before the second defendant can be held liable for the negligent act of its officer, there must be proceedings against the officer personally. And an 'officer' under s 2 of the GP Act:

includes a person in the permanent or temporary employment of such Government and accordingly (but without prejudice to the generality of the foregoing) includes a Minister of such Government.

[21] The plaintiff had indeed commenced proceedings against the first defendant. But was the first defendant a person within the meaning of an officer under s 2 of the GP Act? From evidence adduced, this fact is not established unless one relies on the presumption that a car is driven by a person other than the owner, it is presumed that the driver of the car is the servant and/or agent of the owner. But can this presumption arise in the face of an express statutory provision which demands actual proof of a fact? I do not believe that this vitiates s 6 of the GP Act which specifies that such act, neglect or default must be laid against such *officer* personally. And the first defendant could not have been an officer as can be seen from the testimony of the plaintiff himself when he said 'Rahman (the first defendant) ambil upah bawa kelapa sawit' (Rahman earned his living delivering oil palm). When the first defendant was engaged in such activity to earn a living how could he be an officer of the second defendant? To claim that the first defendant could be under the temporary employment of the second defendant this is also not probable. The military has no business or dealings in palm oil. Its role is to defend the nation. So the first defendant could not be under the temporary employment of the second defendant. In the absence of such proof, I share the view expressed by the courts below that on the face of the evidence as presented by the plaintiff, the plaintiff has not proved his case against the second defendant.

CONCLUSION

[22] Accordingly this appeal should be dismissed with costs.

Suriyadi JCA (delivering majority judgment):

[23] The panel heard this appeal and at the end of the hearing by a majority decision had allowed it with costs. My learned brother James Foong JCA had dissented. The facts and antecedent of the case are as follows: a writ and statement were filed by the appellant but the first defendant had failed to file a defence. The respondent's defence was simple in that it had no idea what the appellant was talking about, was unaware and never was involved in the accident, and had categorically denied ownership of the alleged motor lorry carrying number plate ZA 2596 at the material time. That defence was in reply to the statement of claim which had alleged that the said motor lorry was owned by the respondent.

[24] The appellant, a rider of motorcycle BEH 704, had claimed damages against the driver of motor lorry ZA 2596 (one Rahman Shah bin Alang Ibrahim) ('the first defendant'), as the servant and agent of the Government of Malaysia and sued as the second defendant ('the respondent'), for the injuries and damage sustained pursuant to a collision between them.

[25] The collision had occurred on 19 September 1997 at approximately 11.30am due to the alleged negligence of the first defendant. The appellant had come from the direction of Trolak Timor, when the first defendant driving the abovementioned motor lorry from the opposite direction had encroached onto the appellant's path, thus resulting in a collision.

[26] The respondent at the end of the hearing had submitted a no case to answer and had opted not to adduce any evidence. And despite the strong position of the appellant the subordinate court had still dismissed the writ, not only against the respondent but also against the first defendant who never even filed any defence. Being dissatisfied the appellant had filed an appeal against the whole decision. At the High Court the appellant was partially mollified when the learned judge allowed the appeal against the first defendant but not against the respondent. Still dissatisfied, as the appeal was only partially allowed an appeal was filed as against that unsuccessful part hence our hearing of this appeal. As stated at the outset we had allowed the appeal with costs.

REASONS FOR ALLOWING THE APPEAL

[27] I will start off with the issue of the respondent's submission of no case to answer. This entails perusing the notes of proceedings, so as to gauge whether the procedures had been faithfully complied, and whether there was proper appreciation of the law prior to the dismissal of the appellant's case. The pertinent parts of the notes of proceedings merely state the following:

> Peguam plaintif:
>
> Tutup kes
>
> Peguam Persekutuan:
>
> 1 saksi
>
> Tarikh-11 Mei 2004
>
> 11 Mei 2004:
>
> Peguam plaintif tidak hadir
>
> En Asnawi untuk defendan (2)

Peguam Persekutuan:

Pihak-pihak submit no case to answer dan tidak bercadang kemukakan keterangan.

Tarikh-20 Mei 2004 (hujah lisan)

20 Mei 2004:

Rujuk en 26

Tarikh-28 Mei 2004 (sambung bicara).

28 May 2004:

Brijnandan Singh untuk plaintif.

Asnawi untuk defendan (2)

(From the above last date until 16 May 2004 nothing important happened as either the judge went on leave or attended a course at ILKAP or at one of the mention dates both parties did not appear in court-my remarks)

16 Julai 2004:

Baljit MOB untuk peguam plaintiff dan peguam defendan.

Mahkamah-keputusan seperti di lampiran (29).

Keputusan:

(The complete decision-my remarks)

[28] It is trite that when a submission of no case is undertaken, it means that a defendant at the close of the plaintiff's case (in this case the appellant's) either had not made out a case in law, or the evidence was unsatisfactory or unreliable for the court to hold that the burden had been discharged. In *Storey v Storey* [1960] 3 All ER 279, the court had opined in the following manner:

> There are, however, two sets of circumstances under which a defendant may submit that he has no case to answer. In the one case there may be a submission that, accepting the plaintiff's evidence at its face value, no case has been established in law, and in the other that the evidence led for the plaintiff is so unsatisfactory or unreliable that the court should find that the burden of proof has not been discharged.

[29] Sifting the brief notes of proceedings as supplied above, it was quite obvious that the court had said very little prior to the decision date, when the action against both the defendants was eventually dismissed. The appellant's supreme confidence in that course of action of submitting no case to answer

together with the prompt declaration of its unwillingness to adduce any evidence, had preempted the judge's next course of action. The effect of the upstaging was that the judge's application of his discretion, whether to rule upon that submission of no case to answer, to put counsel for the respondent to elect whether he will or will not call evidence was stopped in its tracks (*Halsbury's Laws of England* (4th Ed) Vol 37, at p 396; *Simirah v Chua Hock Lee & Anor* [1963] MLJ 239; *Jaafar bin Shaari & Anor (suing as administrators of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor* [1997] 3 MLJ 693.

[30] Why that course of action or format of submission was undertaken by the federal counsel was of no concern to the appellant; even if the respondent had been represented by a youthful federal counsel, the court could not detract from the fact that backing him was a powerful organisation that could address and redress his shortcomings. If that officer had failings it should not be held against the appellant.

[31] By so dismissing the action promptly, the subordinate court as endorsed subsequently by the learned appeal judge, must have agreed with the submission of the respondent that there was no case to answer. Procedurally, by so agreeing with that submission, together with the option of not wishing to elect to call evidence, the judge had acted correctly when he thereupon meted down his decision.

[32] So where did the sessions court go wrong? It must be understood that once a defendant elects not to call for evidence, apart from him being bound by that election, the effect is also that all the evidence led by the plaintiff must be assumed to be true. This proposition of law was succinctly said in *Jaafar bin Shaari & Anor (suing as administrators of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor* [1997] 3 MLJ 693 at p 712:

> For, once a defendant in civil proceedings elects not to call evidence, then all the evidence led by the plaintiff must be assumed to be true.

[33] Let us have a second look at the evidence as produced by the appellant. The appellant himself had taken the stand and asserted, inter alia, that an army vehicle had encroached onto his lawful path and had collided into him. In the course of the cross examination he was honest enough to admit that it was so alleged ie that it was an army vehicle as it looked like an army vehicle. The investigating officer who had testified had tendered a sketch plan and a key to that sketch. In the course of the investigation the replacement investigating officer had confirmed that the vehicle, which had collided into the appellant, carried registration No ZA 2596. Understanding the key of the sketch plan the following words were recorded: *Motor lori No ZA 2596 yang*

berada di tempat kejadian. Loosely translated, it means that motor lorry ZA 2596 was still at the place of accident. We were therefore satisfied that the source of information, pertaining to the plate number, was not hearsay based but obtained direct from the immobilised vehicle still left at the scene.

[34] The original investigating officer had passed away hence the assumption of that duty by the replacement officer. In the course of the re-examination this officer had said:

> Dalam IP — nombor kenderaan pada kenderaan. Dalam gambar nombor ZA 2596. Polis tidak tahu sebenar tuan punya motor lori. Nombor ZA 2596, nombor tentera (Interpreted version: In the IP — number of vehicle on vehicle. In the picture it carries ZA 2596. The police did not know the owner of the vehicle. ZA 2596 is an army vehicle).

[35] Despite the above evidence, which prima facie established:

(i) that the appellant was in his lawful path;

(ii) the first defendant had encroached onto the appellant's path;

(iii) a collision had occurred;

(iv) the vehicle driven by the first defendant carried number ZA 2596; and

(v) testified by the investigation officer that, that vehicle was owned by the army,

the court still had refused to accept the truth of the evidence, even in light of the non-existent rebuttal evidence. In relation to the plate number it is pertinent that r 28 of the Motor Vehicles (Registration and Licensing) Rules 1959 (LN 173/1959) states:

> Exemption from licence fees.
>
> No fee shall be payable for a motor vehicle licence granted under these Rules in respect of —
>
> (a) a motor vehicle which is the property of Government;
>
> (b) ...

[36] Under the heading of Fifth Schedule to the said Rules (rr 2 and 5) under marks Part 1 — West Malaysia and Federal Territory of Labuan — the index marks for vehicles is given according to the status of the owner of the vehicle. According to the Rules all index marks starting with Z on a vehicle belongs to the armed forces. If this is read with r 28, the index marked Z belongs to the Government of Malaysia. I herewith reproduce the relevant portion in the Fifth Schedule:

A Status or Owner of Vehicle Index Mark

Armed Forces ... Z: ZA: ZB: ZC: ZD: ZE: ZF: ZG: ZH: ZJ: ZK: ZL: ZM: ZN: ZP: ZQ: ZR: ZS: ZT: ZU: ZV: ZW: ZX: ZY: ZZ:

Counsular Corps ... CC

B Diplomatic Corps ... DC

...

[37] From the above statutory illustration it is quite obvious, according to the Rules, that ZA 2596 belonged to the Government of Malaysia.

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[38] In the Federal Court case of *Kek Kee Leng v Teresa Bong Nguk Chin & Anor* [1978] 1 MLJ 61 Seah J had occasion to state (at p 64):

> The law, as I understand it, is this. The owner of a motorcar is liable for the
> D consequences of the negligent driving of that motorcar by one who is his servant ... But the vicarious liability of the owner of a motorcar for the consequences of someone else's negligent driving of the car is not limited to cases where the driver is his servant.

E **[39]** In *Hewitt v Bonvin* [1940] 1 KB 188, du Parcq LJ in his judgment had stated the following:

> The driver of a car may not be the owner's servant, and the owner will be nevertheless liable for his negligent driving if it be proved that at the material time
> F he had authority, express or implied, to drive on the owner's behalf. Such liability depends not on ownership, but on the delegation of a task or duty.

[40] In *See Keng Wah v Lim Tew Hong* [1957] MLJ 137, the plaintiff on 4 April 1955 was being taken to the seaside by his elder sister See Yim Leng
G (PW6) together with two other sisters and a brother. They crossed half of the Beach Road and stood on the road divider, which was in the middle of the road, for the traffic to pass. See Yim Leng was holding the plaintiff by his left hand. While they were standing there the car of the defendant driven by one Han Hung Juan ran into the plaintiff who fell backwards on to the road and
H sustained injuries. The plaintiff did not bring evidence to prove that Han Hung Juan, the driver of the car, was the servant or agent of the defendant but said that the fact of ownership was prima facie evidence that the car, at the material time, was being driven by the owner or by his servant or agent.

I **[41]** The High Court had asked the correct question when it posed that the question to decide was whether the defendant had rebutted the presumption that Han Hung Juan was his servant or agent. The defendant had not called Han Hung Juan, a very material and essential witness. The court had remarked:

> The court is entitled to the best evidence available before it can be called upon for a decision and if the defendant failed to call a material or essential witness and did not give any explanation why such a witness was not called then, I think, the court is entitled to presume, in his absence, that the evidence of Han Hung Juan would not support the defendant's case (s 115 illustration (g) of the Evidence Ordinance (Cap 4)) — In other words, I do not think the defendant has discharged the onus thrown upon him.

The court thereafter had found for the plaintiff.

[42] From the given evidence and law as propounded, the driver who drove that impugned vehicle therefore must be presumed, to have driven it with the permission of the respondent. The presumption too is that the driver, who was the first defendant, was the servant or agent of the owner of the vehicle ie the Government of Malaysia. To avoid that responsibility or nexus it was thus up to the latter to rebut that presumption.

[43] In the course of the appeal we had found the evidence satisfactory, reliable and by no stretch of the imagination farfetched, to vitiate the presumption of truth at the stage of the plaintiff. With the quality evidence before the court being presumed to be true, the logical step was for the court to find for the appellant, what with the respondent not being assisted by the non-materialisation of rebuttal evidence (*Kayat & Anor v Lim Yew Seng* [1972] 1 MLJ 26).

[44] To complete the judgment, when we allowed the appeal, we were thus satisfied that the appellant had successfully established the ingredients of s 5 of the Government Proceedings Act 1956. It reads:

> Liability of the Government in tort.
>
> Subject to this Act, the Government shall be liable for any wrongful act done or any neglect or default committed by any public officer in the same manner and to the same extent as that in which a principal, being a private person, is liable for any wrongful act done, or any neglect or default committed by his agent, and for the purposes of this section and without prejudice to the generality thereof, any public officer acting or purporting in good faith to be acting in pursuance of a duty imposed by law shall be deemed to be the agent of and to be acting under the instructions of the Government.

[45] One last hurdle to be considered was, even though the appeal was a rehearing, bearing in mind that it emanated from a case tried by a judge alone, should it have been sent back for a new trial in the circumstances of the case (*Young v Rank* [1950] 2 KB 510)? Having perused the notes of proceedings, it was clear that the submission of the respondent was of no case to answer simpliciter. It was not a submission of no case to answer based on

A unsatisfactory or unreliable nature of the evidence led by the plaintiff, and which would have caused us some trouble in arriving at a just decision (*Storey v Storey*; *Yuill v Yuill* [1945] 1 All ER 183 (CA)). Having considered the matter in its entirety we found no reason whatsoever to have it remitted for a new and costly trial. On reflection even if it were ordered the presiding
B court would eventually have found the case for the appellant.

[46] Based on all the above reasons, by a majority decision, we had allowed the appeal on liability, and thereupon set aside the High Court order. No order as regards the quantum was made as the appellant had withdrawn
C its dissatisfaction on this particular matter at the later stages of the appeal. We also had ordered costs at all levels, with such costs to be paid by the respondent to the appellant. The deposit was ordered to be refunded.

Appeal allowed with costs.

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Reported by Brendan Navin Siva

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